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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	

REPLY COMMENTS OF THE NEW MEXICO PUBLIC REGULATION COMMISSION

The New Mexico Public Regulation Commission ("NMPRC") files these reply comments in response to the *Notice of Inquiry* released by the Federal Communications Commission ("Commission" or "FCC") on April 8, 2009 in the above-captioned proceeding.

I. INTRODUCTION

The NMPRC previously filed reply comments regarding the Missoula Plan and expressed concerns regarding a proposal that would effectively require ratepayers in States like New Mexico that have already reduced intrastate access rates and have also rebalanced rates to subsidize such reductions in other States through new or increased subscriber line charges ("SLCs") and surcharges on ratepayers – especially residential ratepayers who make relatively few toll calls. The NMPRC was, and remains, concerned over the possible preemption of State authority over intrastate rates.[1]

[1] See, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Reply Comments of the New Mexico Public Regulation Commission, January 25, 2007, page 2.

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The NMPRC believes that two major causes of distortion in the Non-Rural High Cost Model that are intimately related to this *Qwest II* Remand response[2] appear to be (1) the State Average Cost Rule and (2) the anomalies of bimodal population demographics characteristic of Western States. Previously, the NMPRC, in its *ex parte* filing of October 23, 2008, strongly supported the position of the National Association of Regulatory Utility Commissioners ("NARUC"), as set forth in NARUC's Motion/Request. There, the NMPRC urged this Commission not to make a final decision regarding broad Intercarrier Compensation and Universal Service Reform without providing due process to all interested parties, including issuing new notice and allowing additional comment on the proposed action. We welcome the opportunity to reply to Comments in the NOI to refresh the record on this related USF item.

The NMPRC joins other States in emphasizing the urgency of addressing the issues in the *Qwest II* Remand. We encourage the Commission to work through the remand issues with results that will fit into the eventual big picture of Intercarrier Compensation and USF Reform.

In the interim, the Commission must address those issues that concern the *Qwest II* Remand, including: coherently implementing the law related to Section 254[3] through definitions and orders establishing lower benchmarks for reasonably comparable rates, advancing universal service, and resolving the disparities between urban and rural rates.

An analysis of the misdistribution of High Cost Model ("HCM") support for Non-Rural ILECS would conclude that the situation cries out for revision of the HCM's current cost-based mechanism for determining support. HCM Support should be targeted to wire centers of non-rural carriers that serve wire centers with essentially "rural" characteristics, particularly those with high loop costs per line, in order to comply with Section 254.

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[2] *Qwest Communications Int'l v. FCC*, 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*").
[3] 47 U.S.C. § 254.

Currently, Qwest receives no HCM Support in New Mexico, and none in nine (9) other States, including Arizona, even though Qwest's wire centers serve much of the rural, low-density areas of this State. Approximately forty (40) of Qwest's New Mexico wire centers have per-line costs estimated to be above the statewide average cost.

Mississippi companies are currently projected to receive $51,680,302 for the first quarter of 2009, or 57% of Total High Cost Model Support. Qwest will receive only about $5,861,544 in High Cost Model Support nationwide, and ***zero*** in New Mexico. Competitive ETCs, mostly wireless, are projected to receive about $46,025,067 in support for the quarter, not based on their own companies' costs. Based on the 1st Quarter 2009 USAC Projections and United States Census data, it appears the number of lines reimbursed through HCM Support alone virtually equals *one phone line per person residing in the entire state of Mississippi*, or .93 lines per inhabitant. Such a result defies common sense. The FCC's approach to non-rural high cost methodology has twice been rejected by the federal courts.

The FCC's statement of the purpose of the present NOI is:

> In this notice of inquiry (NOI), we seek to refresh the record regarding the issues raised by the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) in the *Qwest II* decision.[4] In that decision the Tenth Circuit invalidated the Commission's high-cost universal service support mechanism for non-rural carriers, which determines the amount of support to be provided to each state by comparing the statewide average forward-looking cost per line for non-rural carriers to a nationwide cost benchmark....[5]

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[4] *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

[5] FCC 09-28 Notice of Inquiry, CC Docket No. 96-45, WC Docket No. 05-337, Released April 8, 2009, page 2.

II. SPECIFIC COMMENT ON QWEST'S INTERIM PROPOSAL

The NMPRC's reply comment here is addressed specifically to the Qwest "interim" proposal.[6] New Mexico is a geographically large Western State with a relatively sparse population. Qwest is New Mexico's largest wireline ILEC and the only non-rural ETC in the State. With Qwest retaining a considerable majority of the wirelines in New Mexico (around 80%), the NMPRC's ratepayer constituents have a strong stakeholder interest in the outcome of this proceeding.

Many of the recommendations made in the Qwest proposal and the older Windstream proposal have merit, while AT&T's comments call for a broader, more radically comprehensive reform of the USF than the limited NOI seems to have called for comment on.[7]

Developing an "interim" mechanism to de-average[8] costs per line within a State and to identify and direct support to high-cost, low-density rural wire centers would, to some degree, alleviate the current situation. In the current situation, competition in urban, low-cost, high-density wire centers is gradually eroding the ability of non-rural carriers like Qwest to subsidize their high-cost, low-density rural wire centers. This view is properly based on economic factors, not on legalistic arguments about "implicit" versus "explicit" subsidies as some commenters have made.

Qwest, at page 23 of its current proposal, states, "Under the Commission's current rules, federal high-cost support for non-rural carriers is based on statewide average costs.

[6] *In the Matter of Federal-State Joint Board on Universal Service, High Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, Proposal For Implementing The Tenth Circuit's Remand In Qwest II, May 5, 2008.

[7] The Comments of AT&T, as filed in the current docket, seem to address these same issues in a different way. AT&T perceives as a major cause of the problem the implicit subsidy derived from intrastate access rates. AT&T then recommends switching the contribution basis to a per-line basis instead of the current jurisdictionally-separated interstate revenue basis.

[8] The model is initially aggregated and built upward, so technically "de-averaged" is more descriptive.

Consequently, the amount of support provided in a particular rural area may bear little relationship to the cost of providing service in that area. Rather, such support is determined largely by the proportion of relatively high-cost and low-cost lines in the state."

According to USAC data, only Qwest is considered a non-rural carrier in New Mexico. Windstream[9] and Navajo are both classified as price-cap carriers; both receive funding through federal USF rural support mechanisms in New Mexico. However, in some other States, such as Kentucky and Nebraska, Windstream currently receives non-rural High Cost Model Support.

Qwest, in its proposal, would define "medium-size ILECs" as non-rural carriers with fewer than 25 million access lines nationwide. Currently, all non-rural carriers except AT&T and Verizon fall below this threshold. The support mechanism set out in the Qwest proposal could be limited to "medium-size ILECs" (excluding AT&T and Verizon) so as to limit the demands on the fund.

Qwest's new proposal for "interim" relief consists of a trio of important elements, as follows:

(1) Limiting fund support to a new class of carriers defined as "medium-size" carriers (excluding both AT&T and Verizon). By adopting this approach, Qwest estimates that "the Commission could limit the size of the increase in the non-rural program to about $322 million." Qwest explains, "This figure assumes that the Commission freezes the amount of support given to competitive ETCs in these areas. Application of the identical support rule to the new high-cost support would raise the size of the increase[.]"[10]

(2) Replacing the current non-rural support mechanism and targeting High Cost Model support to the highest-cost wire centers served by non-rural incumbent exchange carriers (*i.e.*, wireline). This model would evaluate de-averaged model costs per line to the local

[9] Windstream purchased the former GTE exchanges in New Mexico.
[10] *In the Matters of Federal-State Joint Board on Universal Service, High Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, *ex parte* letter filed by Qwest in WC Docket 05-337, May 5, 2008, page 2.

wire center and eliminate the state-wide average non-rural cost as the basis of comparison. A different national benchmark based on percentage rather than deviation would set a National urban rate benchmark.

(3) In Qwest's earlier proposal, the benchmark was based on a novel, "weighted" urban rate (for residential and business line rate differences) as defined in the analysis. It was to be utilized to replace the National Average Non-Rural Model Cost per line (plus 2 Standard Deviations) as the benchmark and be compared to individual high-cost wire centers' cost per line to determine eligibility and amounts of subsidy support. This would reduce the benchmark to "125 percent of the national average urban rate, and provide federal support above that threshold."[11] Qwest apparently gave up that complex approach in its recent filing, as the 125% benchmark of $31.59 (see its Attachment B) is 125% of the 2007 FCC residential representative monthly charge.[12]

The per-line costs by wire center in excess of the benchmark times the number of lines would be the basis of calculating the subsidy. Qwest summarizes its proposal as follows:

> In contrast, a benchmark set at 125 percent of the national urban rate would advance universal service by ensuring a smaller variance in rural and urban rates. It also would address the Tenth Circuit's concern about the Commission's current use of a cost-based benchmark, given the statute's requirement for reasonably comparable *rates*. If the Commission ensures that the cost of providing service in rural wire centers is reasonably comparable to the average urban rate, there is no question that the rural rate should be within that range. Finally, this lower benchmark would also advance universal service by helping to make broadband services more readily available in rural areas, in furtherance of Section 254(b)(2).

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[11] *In the Matter of Federal-State Joint Board on Universal Service, High Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, "Proposal For Implementing The Tenth Circuit's Remand In Qwest II" May 5, 2008, page 4.

[12] *See* REFERENCE BOOK OF RATES, PRICE INDICES, AND HOUSEHOLD EXPENDITURES FOR TELEPHONE SERVICE 2007, Industry Analysis & Technology Division-Wireline Competition Bureau, at Table 1.13 (as of October 15, 2006), "Standard Deviation Analysis of Residential Rates in the Sample Cities," released 9/2007:

Monthly Charge for Flat-Rate Service 1	$15.03
Federal and State Subscriber Line Charges	5.98
Taxes, 911 and Other Charges	4.26

Total Monthly Charge for Flat-Rate Service $25.27;
$25.27 times 125% = $31.59.

For these reasons, the Commission should adopt a benchmark of 125 percent of the national urban rate.[13]

The current High Cost Model support methodology reinforces intra-state interexchange subsidization of costs (and rates) by focusing on the rural carriers' total average statewide costs as a cutoff point on support within the State, even though non-rural carriers may have many high-cost, low-density, rural wire centers with extremely high loop costs per line.[14] Loss of primary lines in urban areas where costs are much lower than the statewide average costs and below basic charges (revenues) – all else being equal – would reduce net revenues for these primary exchanges services for the firm and would not produce any appreciable incentive to invest in the rural exchanges, where there is little potential for revenue growth.

Increasing basic charges[15] is an obvious solution, but where would this be done? In the high-density, low-cost, urban wire centers that are now subject to the most competitive pressures from cable and wireless? How does a firm compete by raising prices? Would there be price increases in rural areas to reflect higher costs? Because the high average costs associated with low-population wire centers would resulting in hefty local exchange rate increases, this measure would run counter to key federal statutory requirements to make rural rates "affordable" and "comparable with urban rates."

Qwest wants to change the current methodology to "reduce the current non-rural high-cost support benchmark to 125 percent of the national average urban rate, and provide federal

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[13] *In the Matter of Federal-State Joint Board on Universal Service, High Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, "Proposal For Implementing The Tenth Circuit's Remand In Qwest II," May 5, 2008, page 24.

[14] All local exchanges in New Mexico are at essentially the same rates, except where EAS charges apply, due to the NMPRC's efforts to rebalance rates through the State Rural Universal Service Fund proceedings in Case No. 06-00026-UT.

[15] This is defined to include tariffed "rates" as well as Subscriber Line Charges where the firm retains the revenues (with no direct pass-through) to avoid hair-splitting arguments over whether these are included in "rates."

support above that threshold.[16] Having the state average cost fall below the current federal benchmark would exclude Qwest from any statewide support. Qwest's proposal would de-average costs to the local wire center level and compare each directly to the lower, urban rate benchmark. The number of lines times the per-line difference between benchmark and cost(s) would be the support level.[17]

While de-averaging the FCC non-Rural "rural" wire centers might have some benefit for the rural areas of New Mexico and the ratepayers there, especially in terms of investment, changing the methodology from cost-based to rate-based with the current level of bundling service might not be workable,[18] precisely because certain carriers are non-rural, they have urban wire centers at least partially capable of subsidizing their rural components. Some type of control that links specific rates to the net subsidy support is recommended for consideration. Qwest's original proposal, which was more elaborate, included this significant comment: "(4) requiring high-cost support levels to be based on the assumption that an ETC's local rates are at the national benchmark$_{[.]}$"[19] Such an assumption may be a difficult one to meet in reality.

Since Qwest has been successful in most areas in deregulating its intrastate retail rates, how will the FCC and the States regulate the affordability and comparability of Qwest's rates

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[16] "The Ohio Commission agrees with the Joint Board that the national average cost should be used as a basis for establishing the need for support. The Ohio Commission believes that using costs will be a more reliable determinant of the actual need for support that is not met by state action, than rates. The lowest urban rate, and certainly the lowest national urban rate, is not necessarily going to reflect what the rates are or what a "reasonably comparable" rate would be, in any individual state." *In the Matter of Federal-State Joint Board on Universal Service, High Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, Proposal For Implementing The Tenth Circuit's Remand In Qwest II, May 5, 2008, page 4.

[17] At 76%, reflecting 47 CFR § 54.309(a)(4), "Calculation and distribution of forward-looking support for non-rural carriers."

[18] *In the Matter of Federal-State Joint Board on Universal Service High-Cost Universal Service Support,* CC Docket No. 96-45, WC Docket No. 05-337, Comments Submitted on Behalf of the Public Utilities Commission Of Ohio, May 7, 2009, p. 12.

[19] *In the Matter o f Federal-State Joint Board on Universal Service High-Cost Universal Service Support* CC Docket No. 96-45, WC Docket No. 05-337, Comments Of Qwest Communications International, Inc., March 27, 2006, p. 10.

under the proposed subsidy? A decrease in national urban rates and in the benchmark would increase the subsidy to the non-rural, de-averaged wire center, assuming no immediate change in exchange specific wire center average costs per line occurs, regardless of any previous urban: rural comparability ratio. An increase in national urban rates, even if the rural exchange "prices" did not change, would decrease the subsidy. Support for the basic concept of non-rural mechanism revisions should be contingent upon controls that reduce the subsidy amounts for individual companies with outlier rates/charges (*i.e.*, tariffed rates plus retained subscriber line charges).

The NMPRC recommends FCC consideration of a per-line gross revenue adjustment to the formula subsidy amount for both abnormally high and abnormally low rural individual exchange rates that may be needed. A subsidy designed to ensure *rural* universal service should not be manipulated to provide implicit subsidy for competitive rates in the big city.

Using the specific numbers presented by Qwest, this would be specific rural exchange rates, either below or above $25.27±$6.17 cents (*i.e.*, based on the 125% level). The wire center rural rate would be the 1FR with touchtone, as specified in the FCC urban rate calculation.

Paradoxically, both rural rates that are too high (where the carrier is already recovering much of the cost) and too low (where the state may be allowing rural rates to remain low, and carriers are recovering through high intrastate switched access) need to be addressed. Without a mechanism to adjust for the paradox, a carrier that can raise its rural rates with ease (under deregulated or lax state rules) will reap a windfall which will never be reflected in a higher urban rate benchmark and is not self-balancing.

States with high intrastate access rates or with rates that have not been rebalanced can afford to allow subsidized, extremely low, rural rates. Ratepayers in States like New Mexico that have already undertaken these reforms have retail charges on the high end, and consumers there are less able to afford increased burdens through FCC increases in SLCs or surcharges.[20] Reducing support in those States where charges are extremely low compared to wire center costs would indirectly alleviate this situation and motivate those States to take responsibility for reducing their intrastate access rate imbalances by raising local exchange rates.

Local exchange rates would still be regulated by the States. In order to prevent gaming the system, *i.e.*, arbitrage and manipulation, the FCC simply would not pay out a subsidy for the full amount where either an abnormally high or low rural individual exchange rate exists. Subsidies are public policy carrots and sticks, and both sets of behavior need modification.

Other commenters have voiced similar ideas. Windstream proposes the following as the solution:[21]

> A benchmark rate would try to help connect such outliers in rates charged for local service. Carriers would be eligible for support sufficient to enable them to offer service at the benchmark rate (e.g., residential revenues per line equal to $20.00 or higher), but funding would not be provided to support a rate lower than this amount.

Nebraska, in its comment, agrees with a number of other comments about adjusting the subsidy level as a result of some type of rate comparison:[22]

> Accordingly, the Commission needs to utilize a cost model to estimate the costs of providing service. The Commission should conduct a comparison of benchmark rates/revenues to actual rates/revenues. If the rates/revenues exceed the applicable benchmark then a company's support should be reduced by the difference.

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[20] Direct flat charges per residential line function in exactly the same way.

[21] In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service, WC Docket No. 05-337, Comments of Windstream Communications, Inc., April 17, 2008, pages 26-27.

[22] In the Matter of High-Cost Universal Service Support WC Docket No. 05-337 and Federal-State Joint Board on Universal Service CC Docket No. 96-45, Comments of The Nebraska Public Service Commission, May 8, 2009, page 4.

As the United States Court of Appeals for the Fifth Circuit has observed, "[i]n a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers ... ."[23]

III. CONCLUSION

The NMPRC is not advocating any adjustment of the federal Universal Service Fund in such a way as to deprive ETCs other than Qwest of appropriate funding. The NMPRC is not supportive of a zero-sum result that would redistribute monies from States that have implemented needed changes and are using the fund appropriately. Instead, the NMPRC urges the FCC to address funding challenges by looking at those companies and States that are drawing funds in disproportionate amounts.

Serious reform of the Universal Service Fund High Cost Program in order to maintain the Public Switched Telephone Network (PSTN) for the majority of the wireline ratepayers in the State is a worthwhile cause. If done right, it will allow societal recovery of the embedded investment in the legacy infrastructure, and it will maintain the goals of Universal Service in all parts of the Nation.

Respectfully submitted,
THE NEW MEXICO PUBLIC REGULATION COMMISSION

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[23] *Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393, 406 (5th Cir. 1999) (subsequent case history omitted).